STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY,

Petitioner-Appellee,

v

US OUTDOOR ADVERTISING, INC.,

Respondent-Appellant,

and

CITY OF DETROIT BOARD OF ZONING APPEALS,

Respondent-Appellee.

UNPUBLISHED
April 12, 2007

No. 262311
Wayne Circuit Court
LC No. 04-439264-AV

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

METER, J. (*dissenting*).

I respectfully dissent. I believe that the DDA had standing in this case, and I would affirm the circuit court's order.

Generally, a finding of standing requires "the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). In order to establish standing, a plaintiff must establish three elements: (1) that the plaintiff has suffered a concrete "injury in fact"; (2) the existence of "a causal connection between the injury and conduct complained of" that is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) that the injury will likely be "redressed by a favorable decision." *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001) (internal citations and quotation marks omitted).

The DDA has failed to present evidence that it has suffered a concrete injury in fact fairly traceable to the ZBA's decision regarding US Outdoor's variance requests. Although the DDA

argues that the super graphics will harm its overall development plan for the downtown area, the DDA's assertion is unsupported by evidence. Such conjecture is insufficient to satisfy the requisite concrete "injury in fact" required by *Lee, supra* at 739. However, former MCL 125.585(11), which is applicable to this appeal,[1] provided that "a person having an interest affected by [an applicable] zoning ordinance may appeal to the circuit court." The DDA argues that because it has an "interest affected by the zoning ordinance," it has standing under former MCL 125.585(11), regardless of whether it can satisfy the elements required by *Lee, supra* at 739. The primary question, therefore, is whether the operative provision of former MCL 125.585(11) was sufficient, standing alone, to confer standing on the DDA, or whether the DDA must also have satisfied the *Lee* elements.

The Michigan Supreme Court adopted federal judicial rules regarding standing in *Lee, supra* at 739-740. When the Legislature confers standing by statute, such as in former MCL 125.585(11), and that authority conflicts with judicial authority establishing common-law rules, concerns arise regarding the roles of the respective branches of government and the appropriate separation of powers.

In this regard, *Nat'l Wildlife, supra*, is of some import. There, the defendant applied for a permit through the Michigan Department of Environmental Quality (MDEQ) in order to expand its operations, and the MDEQ granted the application. *Id.* at 611. The plaintiffs, on behalf of their members, filed suit in Ingham County Circuit Court and included in their complaint a count under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. *Nat'l Wildlife, supra* at 611. The plaintiffs' MEPA claim was filed under MCL 324.1701(1), which provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1).]

The circuit court dismissed the plaintiffs' MEPA claim based on lack of standing. *Nat'l Wildlife, supra* at 612. After this Court reversed the circuit court, the Supreme Court granted leave, to decide "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing." *Id*. (citation and quotation marks omitted).

The Michigan Supreme Court's majority undertook a comprehensive historical and legal analysis of the principles underlying the separation of powers doctrine and the potential consequences of permitting the Legislature to confer standing by statute without regard to the elements set forth in *Lee, supra.* The majority ruled that "we continue to adhere to *Lee,* and conclude that *Lee* was correct in its holding that questions of standing implicate the constitutional separation of powers, and that forsaking this proposition would imperil the

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[1] See MCL 125.3702(1)(a) and (2).

constitutional architecture . . . ." *Id.* at 621 (citation and quotation marks omitted). The Court further wrote:

> If the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch. If there is dispute over the manner in which the Governor is enforcing or administering a law, such dispute, in the normal course, must be resolved through the executive process. If there are citizens who believe the Governor is wrongfully or inadequately enforcing or administering the state's consumer protection or occupational safety or worker's compensation or revenue laws, it is their right to petition or lobby the Governor in order to alter these policies. It is also the right of such citizens to petition or lobby the Legislature in order to cause them to alter these laws. Finally, of course, it is the right of citizens to participate in the channels of public debate, and in the political processes, in order to influence public policies, or to place in public office persons who are more accommodating to their points of view. Unless there is an individual who has personally been injured by the Governor's enforcement or administration of these laws, it is not normally the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable fashion. That the Legislature – perhaps even with the acquiescence of the executive – has purported to impose this role upon the judicial branch does not alter this constitutional reality. [*Id*. at 622-623.]

The Court decided the standing issue by applying the elements required by *Lee*, and it concluded that the plaintiffs had satisfied those elements. *Id*. at 628-632. Significantly, the Court ultimately ruled that "[b]ecause we hold that plaintiffs have standing without regard to MCL 324.1701(1), *we find it unnecessary to reach the constitutionality of [MCL 324.1701(1)]*." *Nat'l Wildlife*, *supra* at 632 (emphasis added).

In *Brown v East Lansing Bd of Appeals*, 109 Mich App 688, 690; 311 NW2d 828 (1981), Lester Wolterink appealed to the defendant requesting a variance from the 75-foot lot width requirement for new duplex construction. Four plaintiffs opposed Wolterink's request. *Id*. The defendant ultimately granted Wolterink's request, and the plaintiffs appealed to the circuit court. *Id*. at 690-692. Wolterink, proceeding as an intervening party, argued that the plaintiffs did not have standing as "aggrieved" parties under former MCL 125.590. *Brown*, *supra* at 692. The plaintiffs argued that they had standing as persons having "an interest affected by the zoning ordinance" under former MCL 125.585(6), the predecessor to former MCL 125.585(11). *Brown*, *supra* at 692. In deciding the issue in favor of the plaintiffs, the Court wrote that "the essential question is whether the plaintiff has alleged 'special damages.'" *Id.* at 700-701. The Court explained that the plaintiffs had properly alleged "special damages" by way of their affidavits, because there was "at least a potential for interfering with the beneficial use and enjoyment of their own land," and the plaintiffs had provided affidavits demonstrating as much. *Id.* at 699-701. This Court then noted that it agreed with the following commentary:

> "[It] is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are

> contemplated. For this reason statutory grants of aggrieved party status to third parties should be liberally construed. Since it is a matter of standing only, litigation on the merits of the complaint should be relied upon to expose any frivolous complaints.
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> "* * * The reasonableness of any denial of a variance can be examined by the board or the courts, but the requirement of standing should not be employed to inhibit expression of views. If a person can demonstrate that he possesses a *substantial economic interest* in the outcome of the variance proceeding, he should be accorded standing for purposes of appeal regardless of the nature of his legal interest in the affected property. [*Id*. at 701, quoting Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 Mich L Rev 1070, 1084-1085 (1966) (emphasis added by *Brown*).]

Notwithstanding *Nat'l Wildlife* and *Brown*, Michigan's appellate courts have yet to decide whether the grant of legislative standing found in former MCL 125.585(11) is, by itself, sufficient to confer standing in all cases. Although *Nat'l Wildlife* implied that the separation of powers doctrine cannot be usurped by citizen-standing statutes such as MCL 324.1701(1), *Brown* emphasizes the importance of a liberal interpretation of statutory grants of aggrieved party status to third parties if the third party has a substantial economic interest affected by a zoning decision. In light of the unique circumstances of this case, I believe that the DDA's ability to satisfy the "interested party standard" in former MCL 125.585(11) was sufficient to confer standing on the DDA, without regard for the judicial elements set forth by *Lee*, *supra.*

The DDA is a statutory creation established, under the authority of MCL 125.1651 *et seq*., "to eliminate the causes of [property value] deterioration and to promote economic growth in the downtown business district . . . ." Detroit Ordinances, art II, § 14-2-1. The DDA advises the city's Executive Planning Council and the city's Planning Commission with regard to the formulation and implementation of project development plans. Detroit Ordinances, art II, § 14-2-2. The trial court correctly observed that the DDA "is a different type of animal" than the average citizen who has less of an interest in the overall development of the city. The DDA is not only armed with the statutory purpose and authority to monitor downtown Detroit's development, but the record shows that the DDA has created a development plan for the downtown area that was approved by the Detroit City Council and has invested nearly $65 million in improvements to the affected area. Given the DDA's unique status, the possibility for a serious erosion of the separation of powers in this instance is not troublesome, because the DDA is not claiming the typical "citizen standing" under former MCL 125.585(11), like the plaintiffs in *Nat'l Wildlife* claimed under MCL 324.1701(1). Rather, the DDA is the party at the center of a comprehensive statutory scheme, and it is a party that epitomizes an "interested party" under former MCL 125.585(11). Accordingly, many of the concerns facing the Court in *Nat'l Wildlife* regarding the Legislature's grant of citizen standing simply are not present here. Further, the DDA satisfies the less rigid standard set forth in *Brown*, *supra*, by having a substantial economic interest in the surrounding area, regardless of whether the DDA has actually suffered an injury in fact as required by *Lee.*

Accordingly, I would hold that former MCL 125.585(11), standing alone, was sufficient to confer standing to the DDA in this case.

I do not find the majority's reliance on *Michigan Educ Ass'n v Superintendent of Public Instruction*, 272 Mich App 1; 724 NW2d 478 (2006), persuasive. In *Michigan Educ Ass'n*, *id.* at 10, the Court found instructive the nonbinding opinion of Judge Smolenski in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005). In that case, Judge Smolenski wrote:

> Although the majority in [*Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004)] declined to specifically examine the constitutionality of MCL 324.1701(1), it clearly determined that the Legislature was without the authority to expand standing beyond the limits imposed by Michigan's constitution. Because the Court in [*Nat'l Wildlife*] intentionally took up and discussed the Legislature's authority to confer broader standing, its decision on that matter is binding on this Court. *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001).[2] [*Nestlé Waters*, *supra* at 10 (Smolenski, J.).]

In *Michigan Educ Ass'n*, *supra* at 12, the Court, taking its cue from Judge Smolenski's opinion in *Nestlé* and citing *Higuera*, stated that "we are required to follow our Supreme Court's decision on the matter of the Legislature's authority to confer broader standing." The *Michigan Educ Ass'n* Court essentially determined that the *Nat'l Wildlife* majority issued a binding opinion indicating that, in all cases, if the elements of *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), are not fully satisfied, a plaintiff does not have standing despite legislative authority stating otherwise. See *Michigan Educ Ass'n*, *supra* at 12. I cannot read *Nat'l Wildlife* in such a broad manner. The *Nat'l Wildlife* Court did not make a clear and sweeping statement indicating that in *all* cases, the failure to satisfy the *Lee* elements would be fatal to a plaintiff's claim of standing. Indeed, in stating that it continued to uphold the validity of *Lee*, the Court emphasized that "*Lee* was correct in its holding that questions of standing implicate the constitutional separation of powers, and that forsaking this proposition would imperil the constitutional architecture . . . ." *Nat'l Wildlife*, *supra* at 621 (citation and quotation marks omitted). In my opinion, this statement implies that if the separation of powers doctrine is not imperiled in a particular case, then standing might be appropriate even if a plaintiff cannot fully satisfy the *Lee* elements. The fact that the *Nat'l Wildlife* Court did not reach the constitutionality of the statute at issue in that case, see *id.* at 632, is further evidence that the Court did not intend to make a broad and binding proclamation such as that inferred by the dissenting judge in the instant case.

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[2] In *Higuera*, *supra* at 437, the Court stated that

> [w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision. [Emphasis in *Higuera*; citations and quotation marks omitted.]

The unique characteristics of the DDA, a statutorily created entity charged with aiding the economic development of Detroit, persuade me that many of the concerns about citizen standing raised by *Nat'l Wildlife* (see, for example, *id.* at 615) are not present in this case. This case does not involve a mere citizen displeased with a particular legislative or executive decision, and ruling in the DDA's favor would not promote the judicial branch's "becoming intertwined in every matter of public debate." *Id.* at 615. The DDA has the specific authority, given by statute, to promote particular development schemes in Detroit, and it therefore has a unique and identifiable interest in the case at hand, even if it has not, at this point, demonstrated a concrete "injury in fact." I find no violation here of the underlying precepts of *Nat'l Wildlife* and do not believe that we are bound in this case by the holding in *Michigan Educ Ass'n*. I conclude that the DDA had standing to sue.

Additionally, I find no merit to the remainder of US Outdoor's appeal.

I would affirm.

/s/ Patrick M. Meter